

FEDERAL CIRCUIT COURT OF AUSTRALIA

*WADHAWAN v MINISTER FOR
IMMIGRATION & ANOR*

[2016] FCCA 1044

Catchwords:

MIGRATION – Judicial review of refusal of grant of student visa – assessment supported by bogus document – application dismissed.

Legislation:

Migration Act 1958 (Cth)

Migration Regulations 1994(Cth)

Cases cited:

Sandhu v The Minister for Immigration & Anor [2013] FCCA 491

Applicant:	ASHISH WADHAWAN
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG 204 of 2015
Judgment of:	Judge McGuire
Hearing date:	31 March 2016
Date of Last Submission:	31 March 2016
Delivered at:	Melbourne
Delivered on:	25 May 2016

REPRESENTATION

Solicitors for the Applicant: Self Represented

Counsel for the First Respondent: Mr Rogers

Solicitors for the First
Respondent:

Australian Government Solicitors

ORDERS

- (1) That the name of the second respondent be amended to read “Administrative Appeals Tribunal”.
- (2) That the application for judicial review be dismissed.
- (3) That the applicant pay the first respondent’s costs fixed in the sum of \$5800.
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 204 of 2015

ASHISH WADHAWAN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for judicial review of a determination of the Migration Review Tribunal (as it then was) (“the Tribunal”) affirming the decision of the minister’s delegate not to grant the applicant a Skills Graduate (Temporary) (Class VCN) Sub Class 485 Visa. The applicant applied for the visa on 18 December 2008. He is from India. His nominated occupation for a skills assessment was as a pastry cook. He held a student visa at the time of the application.
2. The Minister’s delegate and the Tribunal each put the applicant on notice as to concerns with his claim to have completed 900 hours of voluntary work with Axilleon Cakes for the purposes of his assessment.

3. The applicant was given a skills assessment on 27 May 2008. That skills assessment was issued by Trades Recognition Australia (TRA). Notably, that skills assessment was issued on part-reliance on the provision of the reference from Axilleon Cakes. The Minister's delegate, and later the Tribunal, did not accept that the applicant had in fact performed the claim of 900 hours of unpaid work experience.
4. The concerns and ultimate determination of the delegate and the Tribunal stem from the involvement in the process of the reference of an individual who was subsequently prosecuted on pleas of guilty in the County Court of Victoria for providing bogus information or bogus documentation in the form of references as to work completed by applicants for visas. A non-publication order continues in respect to that individual who shall be referred to as only "CA".
5. Consequently, whilst the applicant maintained to the Tribunal that he had performed his 900 hours of work experience, the Tribunal preferred that the evidence provided by the applicant was bogus and was not, as a matter of credit, prepared to accept the applicant's uncorroborated evidence.

Application to this Court

6. The application for judicial review contains only a narrative in the form of a plea by the applicant for reconsideration of his application for a B visa and specifically his evidence that he had completed 900 hours of work experience. The applicant's oral submissions before this court were of a similar theme. In this sense, the grounds of the complaint seek no more than an impermissible merits review. No jurisdictional error in the Tribunal is claimed or argued before me. It is clear from its reasons at [37] that the Tribunal did take into account the applicant's evidence and claim. The Tribunal found some of the applicant's evidence about his work at Axilleon Cakes to be vague or inconsistent [38] and uncorroborated [39]. At [41] the Tribunal referenced the applicant's argument in its consideration of matters of credit as follows:

The applicant has provided references and payslips as evidence of his employment at Noisette Bakery; Schwob's; Swiss Bakery and Michelinos Bakery. Oft the Tribunal is satisfied the applicant is a qualified baker with more than 5 years of experience in the industry, the Tribunal is not satisfied that his capacity to obtain

further work at other bakeries demonstrates that he undertook the work experience of over 900 hours at Axilleon Cakes as claimed.

7. Significantly, the Tribunal had before it evidence from the Department obtained under summons that the applicant's work reference was "almost identical in content and format" to others seized from CA under a search warrant and in respect to that individual's prosecution.
8. Relevantly, the Tribunal was obliged to address the criterion for the granting of a Sub Class 485 Visa and specifically cl.485.224 of the Schedule 2 of the *Migration Regulations* (1994) including the requirement to satisfy PIC4020 which provides;

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an Officer, the Tribunal during the review of a Part 5- reviewable decision, a relevant assessing authority or a medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:-

(a) the application for the visa; or ...

(4) the Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that;

(a) compelling circumstances that affect the interest of Australia; or

(b) compassionate or compelling circumstances that affects the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

Justify the granting of the visa.

9. "Bogus document" was at the relevant time defined in the Act at s97 as;

Bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that; (a) purports to have been, but was not, issued in respect of the person; or (b) is counterfeit or has been altered by a person who does not have authority to do so; or (c) was obtained because of a false or misleading statement, whether or not made knowingly.

10. The determination of the Tribunal was essentially one of credit. It had before it evidence consistent with the proven behaviour of CA to be

considered against the evidence of the applicant which it found to be vague, inconsistent and uncorroborated. I am satisfied that the Tribunal understood and engaged the applicant's evidence and his claim.

11. The Tribunal further understood its own role when at [42] the reasons state;

The Tribunal notes it is sufficient that the Tribunal "reasonably suspects" that the document provided by the review applicant was bogus, for example, because it was not issued in respect to the applicant or because it is counterfeit or it has been altered or obtained because of false or misleading statement (see Sandhu v The Minister for Immigration & Anor [2013] FCCA 491).

12. The Tribunal's understanding of the legislation and its task is also evident at [43-44] where it finds;

Based on the evidence before it, which the Tribunal considers of sufficiently probative value, the Tribunal finds that the work reference letter given to TRA by the review applicant contained a false statement that the review applicant completed 900 hours work experience as a pastry cook at Axilleon Cakes. Accordingly, the Tribunal finds that the skills assessment (reference/receipt no: TRA08/077211009) of 27 May 2008 from TRA was obtained because of a false or misleading statement and that the skills assessment is a bogus document, being a document which the Tribunal reasonably suspects was obtained because of a false or misleading statement, whether or not made knowingly (s97(c) of the Act).

*Accordingly, the Tribunal is **not** satisfied that there is **no evidence** that the review applicant has given, or caused to be given, to the Minister, or an officer of the Department, the Tribunal or a relevant assessing authority a bogus document or information that is false or misleading in a material particular in relation to his application for a Skilled (Provisional) (Class VC) Visa. Accordingly, the Tribunal finds that the review applicant does not meet the requirements of paragraph 4020(1) (a).*

13. I am satisfied then that the Tribunal moved to consider whether there were compelling and/or compassionate circumstances in respect of this applicant so as to waive the provisions of PIC4020. These matters are dealt with in detail in the reasons at [50-53]. I am satisfied again that the findings of the Tribunal were those open to it but, in any event, no

quarrel appears to have been taken by the applicant with these considerations.

Conclusion

14. The applicant himself raises no particularised jurisdictional error in his application for review. None is apparent in the Tribunal's reasons. The applicant in his oral submissions raises no particularised jurisdictional error. The Tribunal addressed and engaged the applicant's claims and evidence in what was ultimately a decision based on credit and one which was open to the Tribunal. There being no jurisdictional error, the application will be dismissed with an order for costs.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Judge McGuire

Date: 25 May 2016